NO. 2434

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

ASH SHEEP COMPANY, a Corporation,
Appellee.

BRIEF OF APPELLEE.

C. B. NOLAN,
WM. SCALLON,
Of Counsel for Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ASH SHEEP COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLEE.

Appellant's action depends primarily, if not wholly upon the contention that the lands in question are still a part of the Crow Indian Reservation, or, in the language of the complaint, "that all of the said lands are reserved lands and a part of the lands reserved and set aside by the said United States for the use and benefit of the said tribe of Crow Indians, in said State and District of Montana."

This contention cannot be sustained without doing violence to the very act on which appellant relies (Act approved April 27, 1904) and without wiping out its most important provisions.

Under that Act, and the agreement thereby confirmed, (with amendments) the Indians "cede, grant and relinquish to the United States all right, title and interest which they may have to the lands embraced," etc. (describing a part

of the then existing reservation). The terms of the cession are absolute.

It is well understood that the Indians had no title, but only a right of occupancy in the lands set aside for them as a reservation.

Spaulding v. Chandler, 160 U. S. 394-407.
Johnson v. McIntosh, 8 Wheat 543.

It is well settled that the right of occupancy of Indians can be ended by Act of Congress, as well as by treaty or agreement with the Indians.

Same authorities and
Beecher v. Wetherby, 95 U. S. 517.
Buttz v. Northern Pac. R. R. 119 U. S. 73.
Lone Wolf v. Hitchcock, 187 U. S. 553.

When the right of occupancy is ended or abandoned with the approval of the United States all the Indian rights are extinguished.

Buttz v. N. P. R. R. Co., Supra.
United States v. Cook, 19 Wall. 591.

The Act of 1904 and the original agreement both contemplated and provided for the ending of the Indian occupancy and the removal of the Indians to the "diminished reservation." Article IV provided as follows:

> "Art. IV. That for the purpose of segregating the ceded lands from the diminished reservation the new boundary lines described in Article I of this agreement shall, when necessary, be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, the cost of said survey to be paid by the United States."
>
> "Art. III. All lands upon that portion of the reservation hereby granted, ceded, and relinquished which

> have, prior to the date of this agreement, been allotted in severalty to Indians of the Crow tribe shall be reserved for said Indians, or where any Indians have homes on such lands they shall not be removed therefrom without their consent, and those not allotted may receive allottments on the lands they now occupy. But in case any prefer to move they may select land elsewhere on that portion of said reservation not hereby ceded, granted, or relinquished, and not occupied by any other Indians, and should they decide not to move their improvements, then the same may be sold for their benefit, said sale to be approved by the Secretary of the Interior, and the cash proceeds shall be paid to the Indian or Indians whose improvements shall be so sold."

Section 4 of the Act, after providing for allotments in pursuance of Article III, contains the following:

> "The Secretary of the Interior shall fix a reasonable time within which such Indian occupants shall elect whether they will remain on the ceded tract or remove to the diminished reservation, and where they elect to remove he shall so fix a reasonable time within which such occupants must remove their improvements if they should choose to do so instead of having the same appraised and sold."

The intention thus clearly indicated was that the Indians should remove to the "diminished reservation" except in the case of those Indians entitled to allotments in severalty in the ceded portion who elected to remain there. It is, of course, well understood that allotments in severalty do not continue in existence "Indian rights" as such.

If the lands are still part of the reservation they are still subject to the laws relating to "Indian Country." It seems self-evident that when lands are thrown open to exploration and settlement they are no longer "reserved." But counsel argue that they are not subject to entry under the desert or

timber and stone act. Even so. No definition of the term "public lands" requires that the lands be open to entry under all the general laws relating to land. Vacant mineral lands of the United States are surely "public lands." Yet "lands valuable for minerals * * * are reserved from sale, except as expressly directed by law," and when known to be valuable for minerals can only be sold under the mining laws. If the argument were sound, mineral lands would not be "public lands." The definition quoted from Newhall v. Sanger applies to lands "subject to sale, or other disposition, under general laws." The homestead, townsite and mineral laws are each and all general laws. The lands in question are subject to sale and disposition under said laws. The price to homesteaders is changed, but that is only a detail.

The language of the Act of 1904 is quite explicit regarding the disposition to be made of the lands. Section 5, after providing for allotments by the Commissioner of Indian Affairs to Indians entitled thereto,—which allotments were to be made prior to the opening of the lands to settlement or entry,—and after providing also for school sections and for the withdrawal of lands under the Reclamation Act, contains the following:

> "That the lands not withdrawn for irrigation under said reclamation Act, which lands shall be determined under the direction of the Secretary of the Interior at the earliest practical date, shall be disposed of under the homestead, town-site, and mineral-land laws of the United States, and shall be open to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; * * *
>
> "Lands entered under the town-site and mineral-land

> laws shall be paid for in amount and manner as provided by said laws, but in no event at a less price than that fixed herein for such lands, if entered under the homestead laws, and in case any entryman fails to make such deferred payments * * * * the entry shall be held for cancellation and canceled."

If appellant's view were correct, what would be the position of a homesteader or of a purchaser from the state? Here it may be noted that the rights of the state to school sections, or to sections acquired in lieu thereof under the provision of the Act, attached and became fixed before the land was thrown open to settlement. The state has a right to sell lands. The land of a homesteader or of a purchaser from the state might be entirely surrounded by lands not yet sold. If so, he might find all access to his land barred by a lessee or lessees of the Indian Department, who, under the regulations of the Indian Department, might fence up all the leased lands. A homesteader or purchaser from the state could not rely on any statutory provision relating to "public lands." He could not rely on the prohibitions contained in Section 3 of the Act of February 25, 1885, against preventing or obstructing free passage over public lands; for, according to appellant's theory, the lands would not be public.

We submit that there can be no middle ground and no intermediate state or condition. These lands are either reservation lands or are public lands. They cannot be both. Nor can they be part "Indian" or "reservation" and part "public" or "free." The statutes which relate to public lands and those which relate to reservation lands or Indian lands are so radically different that they cannot be applied at the same time in

the same district. The confusion that would result from such an attempt would be so great that such a view should not be entertained unless there was some express statutory provision from which there was no escape.

The only consistent and reasonable conclusion is that these became "public" when they were thrown open for settlement if not before. Such being the character of the lands, the action cannot be sustained.

Buford v. Houtz, 133, U. S. 320.

THE SO-CALLED TRUST.

Counsel argue next that these lands are held in trust by the United States for the Indians. If this were correct, it would still be true that they were no longer "reserved," or "reservation," or "Indian" lands. They would no longer be reserved or excepted from entry or "withdrawn" for any purpose. Insofar as the public are concerned, they are in fact open to entry by homesteaders; they are open to exploration and location by prospectors. The title of the state to school sections or to lieu sections has become fixed. These can be sold or leased by the state. It goes without saying that the homesteader or locator, or the purchaser or person claiming under the state must have a right of ingress and egress to and from his land. How then can these lands be distinguished from the rest of the public lands? It will hardly be contended that leave must be obtained from the Indian agent or the Indian Department to enter upon them, with a view to exploration or to settlement and entry, or to visit a lawful resident, or to drive across these lands.

However, let us see whether the so-called trust affects the lands.

Will it be contended that Congress intended to limit or modify the title of the United States? The United States was already owned in fee absolute; all that the Indians ceded was their right of occupancy. Congress might have put an end to the right of occupancy by the Indians, even without treaty or agreement. (Authorities supra). Can it then be consistently maintained that Congress intended to restrict the title of the United States, or to modify it so as to give the Indians an equitable right in or to the lands themselves? The Indians had no title at all before. It is not the policy of the United States to give to the Indians any title except upon the breaking up of the tribal relations, and then only in severalty. Are we to assume that Congress intended a reversal of that policy, even to the extent of conferring an equitable title upon the indians? There was no reason therefor.

We submit that the correct view is, that the "trust" was simply an undertaking to treat the proceeds as trust funds and to act in the matter of the sale as a trustee might act. Such a trust cannot properly be held to affect the title of the sovereign, or to affect the land at all. Moreover, if we observe the language used, we see that there is no trust to "hold for the Indians," or "to care for," or "to manage," or "to lease" the lands.

To all intents and purposes and whatever the obligations of the United States to the Indians may be, the lands must be regarded as "public lands" for there is no way to distinguish them from such as are unquestionably public lands.

THE RIGHT TO LEASE.

It really matters but little whether the leases alleged in the complaint can be questioned in this case or not. They are entirely immaterial. The alleged leases cannot be made the foundation of appellant's right of action. They cannot enlarge appellant's rights. But it is to be kept in mind that it is the appellant who alleges the existence of these leases and who seeks to make a point of them. How then can it be argued that their validity is not open to question? The allegations being made, they may be denied. If denied, they must be proved. If they must be proved, it must appear that they are lawful leases. The leases are invalid. They were not granted by Congress but by a departmental officer. This officer could not grant the leases without express authority of law. He must have authority of law or his acts are void. The Indian Department assumes to act under a remnant of authority supposed to be left in it, under the theory that the character of Indian lands still, in some measure, attaches to the unsold portions of the region in question. There is no express statutory authority. None can be implied from the Act in question. It must be evident that whatever be the legal status of these lands, control over them by the Indian Department has come to an end. Moreover, the departmental officer is not himself a trustee. He is a mere agent. Even if a theoretical right to lease on behalf of the United States were assumed to exist, statutory authority would be required to authorize any department or departmental officer to make leases.

The point sought to be made by appellant, that a stranger cannot complain of the acts of a trustee, does not apply at all.

Alleged acts of a trustee, if put in issue, must be proven. So the acts of an alleged agent of a trustee. In the latter case the agency would have to appear, and if no lawful agency appears, the acts of the alleged agent cannot be considered as lawful acts or as having been proved. In this case, plaintiff alleging leases, must show leases made by competent authority, or his proof as to the leases would fail. Therefore, the leases in question cannot help the plaintiff. No authority for the making of the leases can be found. The Indian Department is given no authority whatever by the act or by any other law applicable to the case. It cannot exercise any authority in the premises that would conflict with the rights of settlers, with the powers of the land office, and with the whole spirit of the Act.

Respectfully submitted,

C. B. NOLAN,

WM. SCALLON,

For Appellee.